SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 322

PETE LUBETICH, AN INDIVIDUAL DOING BUSINESS AS PACIFIC REFRIGERATED MOTOR LINE,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

ALBERT E. STEPHAN,
Counsel for Appellant.

PRESTON, THORGRIMSON, TURNER,
HOROWITZ & STEPHAN,
Of Counsel.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Civil Action No. 314

PETE LUBETICH, AN INDIVIDUAL DOING BUSINESS AS PACIFIC REFRIGERATED MOTOR LINE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

JURISDICTIONAL STATEMENT BY PLAINTIFF UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

The plaintiff-appellant respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above entitled cause sought to be reviewed:

A. Statutory Provisions.

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Section 267, 36 Stat 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, Section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Section 35, 31 Stat. 85; April 30, 1900, c. 339, Section 86, 31 Stat. 158; March 3, 1909, c. 269, Section 1, 35 Stat. 838; March 3, 1911, c. 231, Sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Section 2, 38 Stat. 804; February 13, 1925, c. 229, Section 1, 43 Stat. 938).

B. The Statute of a State, or the Statutes or Treaty of the United States, the Validity of Which is Involved.

The validity of a statute of a State, or of a statute or treaty of the United States, is not involved.

C. Date of the Judgment or Decree Sought To Be Reviewed and the Date Upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on July 8, 1941. The petition for appeal was presented and allowed on July 9, 1941, together with an assignment of errors.

D. Nature of Case and of Rulings Below.

This is an appeal from a decree of the District Court of the United States for the Western District of Washington, Northern Division, entered July 8, 1941, denying an applica-

tion for an injunction against an order of the Interstate Commerce Commission dated July 2, 1940, in its Docket No. MC 34383, Pete Lubetich Common Carrier Application 24 MCC 141, which denied an application for a certificate or a permit to operate as a motor carrier pursuant to the so-called "grandfather" clause provisions of the Interstate Commerce Act, Title II. The complaint was filed in said court on January 8, 1941, and amended April 4, 1941, under and pursuant to the provisions of Section 41 (28) and Sections 43 to 48, inclusive, of Title 28 U. S. Code.

Said complaint as amended prayed the court find that the Commission erred in holding that the application should be denied on the theory that applicant had been engaged during a portion of the vital period in operations as an "owner-operator"; and, further, that the Commission was in error in requiring plaintiff to cease his operations prior to the time when it had determined a still pending application covering the identical territory under proof of public convenience and necessity.

The court was asked to wholly suspend the operation of the order of the defendant, Interstate Commerce Commission, and "that upon final hearing herein a decree be entered setting aside and annulling and perpetually enjoining the enforcement of said order * * * so far as same requires plaintiff to discontinue his operations as a common carrier by motor vehicles of general commodities in interstate commerce between points in Washington, Oregon and California." The case was heard on final hearing on April 14, 1941, before a court of three judges organized pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913 (Chapter 32, 38 Stat. 220). The oral testimony introduced before the Interstate Commerce Commission was received in evidence before the court, but the documentary evidence which had been offered as exhibits during the hear-

ings before the Interstate Commerce Commission was not proffered or received in evidence; the fundamental question presented was whether, under the provisions of Section 206 and 209 of the Interstate Commerce Act, Title II, the Commission has authority to deny an application when it has still pending before it another application in which full evidence of public convenience and necessity has been offered; and whether the Commission was correct, as a matter of law, in denying to applicant a certificate or permit to operate as a common or contract carrier upon the theory that during a portion of the time the applicant had performed operations as an "owner-operator". Thereafter, on June 10, 1941, the court rendered its opinion holding that the prayer of the complaint should be denied, and on July 8, 1941, said court entered the decree sought to be reviewed.

Pete Lubetich is an individual doing business as Pacific Refrigerated Motor Line. The Commission's decision heretofore referred to outlines the essential facts with respect to the operation. No question is raised as to the adequacy of the hearings upon which the Commission's report and order was based because plaintiff admits that its inability to produce the necessary copies of the documentary evidence precludes the raising of that question.

The question presented by this appeal is a substantial one. There are several other proceedings pending before the Commission involving the same question as presented by this appeal. A three-judge Federal Court sustained a complaint founded upon similar facts in *Rosenblum Truck Line* v. *United States*, 36 Fed. Supp. 467. The United States and Interstate Commerce Commission have filed their appeal in the United States Supreme Court from the court's action in that case.

E. Cases Sustaining the Supreme Court's Jurisdiction of the Appeal.

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

United States v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454;

Florida v. *United States*, 282 U. S. 194;

Beaumont, Sour Lake & Western Railway Company v. *United States*, 282 U. S. 74;

Ann Arbor Railroad Company v. *United States*, 281 U. S. 658;

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1;

Interstate Commerce Commission v. *Union Pacific Ry. Co.*, 222 U. S. 541; and

United States v. *Lowden*, 308 U. S. 225.

F. Decree and Opinion of the District Court.

Appended to this statement is a copy of the opinion of the District Court and a copy of the decree of said court sought to be reviewed.

We therefore respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated July 9, 1941.

Respectfully submitted,

PRESTON, THORGRIMSON, TURNER,
HOROWITZ & STEPHAN,
By ALBERT E. STEPHAN,
Counsel for Pete Lubetich, an Individual Doing Business as Pacific Refrigerated Motor Line.

EXHIBIT "A".

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. Civil 314.

Filed June 10, 1941.

PETE LUBETICH, an Individual Doing Business as Pacific Refrigerated Motor Line, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant,

INTERSTATE COMMERCE COMMISSION, Intervening Defendant.

Before Haney, Circuit Judge, and Bowen and Black, District Judges.

BLACK, District Judge:

In plaintiff's action, as set forth in his complaint and supplemental complaint, plaintiff sought to set aside an order of the Interstate Commerce Commission denying him a "grandfather" certificate authorizing common carrier operation between points in California, Oregon and Washington upon the contention that on and prior to June, 1935 and continuously thereafter he has been engaged in a bona fide common carrier operation, and further sought in the event such "grandfather" application should be denied to have this Court require the effective date of such denial order to be deferred until the Commission shall dispose of plaintiff's BMC 8 application for a certificate of public use and necessity, which last application was filed about three years after the "grandfather" application was made.

The Commission's order denying the "grandfather" application was issued July 2, 1940 in a proceeding entitled "Pete Lubetich Common Carrier Application 24 Motor Carrier Cases 141 (the portion of the printed report referring to the Lubetich application beginning on page 147)". The first effective date of such denial order was August 10, 1940 but such effective date, at the request of plaintiff, was con-

tinued from time to time to January 10, 1941. The Commission shortly before January 10, 1941 advised that it would be willing, at the request of the Court, to further extend the effective date of the order, which upon such Court request it has extended until June 15, 1941, so as to permit the hearing before this three-judge Court prior to the final effective date.

Such consideration by the Commission is substantial evidence that it has not been arbitrary towards plaintiff, as plaintiff contends.

The evidence presented to the Commission consisted of both oral testimony and a large quantity of exhibits. Plaintiff has introduced before us a transcript of the oral testimony but such transcript failed to include the exhibits. Such exhibits are an important part of the evidence.

The plaintiff acknowledges that the failure to produce all of the evidence before the Court has heretofore been held a bar to the Court's passing upon any contention that the findings of the Commission are contrary to the evidence.

Unquestionably without bringing before the Court all the evidence considered by the Commission the plaintiff cannot question the facts found by the Commission.

> Tagg Bros. *v.* United States, 280 U. S. 420, 443-444;
> Mississippi Valley Barge Line Co. *v.* United States, 292 U. S. 282, 285-286.

In connection, therefore, with plaintiff's attempt to set aside the order denying plaintiff the "grandfather" certificate as a common carrier, the Court is only entitled to consider whether or not the ruling of the Commission was supported by the findings as made by it.

The plaintiff chiefly relies upon this phase of the case upon the decision in N. E. Rosenblum Truck Lines *v.* United States, (D. C. Mo.) 36 F. Supp. 467, in which a similar Court to this one held that that plaintiff was entitled to a "grandfather" permit as a *contract* carrier. Plaintiff's complaint and supplemental complaint are based entirely upon the contention that the Commission was in error in denying him rights as a "common carrier". Plaintiff in such pleadings only asked that the Commission's order should be suspended or set aside "insofar as same requires plaintiff to

cease his operations as a common carrier * * *." Such in any event distinguishes the Rosenblum case, supra.

Included in the findings of the Commission, 24 M. C. C., 141 at pages 147-150, we find the following:

"The operations which applicant seeks authority to continue were commenced on March 15, 1935, and were conducted over a regular route between Los Angeles and Seattle, and also over certain irregular routes. Between June 1935 and January 1938, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers, and was transported in applicant's vehicles only between the terminals of the other carriers. In January 1938 applicant engaged a solicitor of his own, established terminals, and apparently discontinued the operations previously conducted in connection with these other carriers. He now operates eight pieces of equipment, of which he owns only two. * * *

"As hereinbefore stated, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers. Prior to January 1938, applicant operated two trucks. * * *

"During the period from April 1937 until January 1938, at least, every shipment listed in applicant's exhibit purporting to prove operations was transported by applicant for Hendricks." (Referring to Hendricks Refrigerated Truck Lines, Inc., the operations of which are described in said same report under No. MC-68618) "In such instances the bills of lading were issued by Hendricks, and Hendricks employed applicant to transport the goods. * * * The tariff rates applied were those of Hendricks. * * * in fact, the evidence shows that at least during the period from April 1937 until January 1938 the only freight transported in applicant's equipment was for Hendricks, a common carrier by motor vehicle."

Although the plaintiff appears to have been a common carrier from January, 1938 to the time of the hearing, such findings of the Commission certainly support the conclusion that the plaintiff was not at all times from before the critical date of June 1, 1935 to January, 1938 a common carrier.

Under the authority of United States *v.* Maher, 307 U. S., 148, 155, it was necessary that plaintiff should be such from June 1, 1935 to the date "when the Commission passed upon the application" for a certificate under the "grandfather" clause.

Clearly, on the record before this Court, we have no authority to disturb the denial by the Commission of certificate to plaintiff under the "grandfather" clause.

The alternative contention of plaintiff is that the Court should compel deferment of the effective date of such order of denial until the BMC 8 application is passed upon.

Plaintiff's two applications constitute two separate proceedings, one of which has been finally disposed of—the other is awaiting future decision. We cannot accept plaintiff's suggestion that a BMC 8 proceeding, which plaintiff delayed instituting until three years after his application under the "grandfather" clause was made and which, in fact, was not instituted until less than ten months before the decision denying his earlier application, can be welded to and made a part of the "grandfather" proceeding so as to prevent final action upon the "grandfather" proceeding until the BMC 8 proceeding is ultimately disposed of. Under the Interstate Commerce Act the Commission is granted power to determine when its orders shall become effective. Since it had the authority to deny the "grandfather" application it could say when that order should be effective. The Supreme Court in *United States, et al.* v. *Baltimore & Ohio R. Co., et al.*, 284 U. S. 195, said:

"'Orders (referring to those of the Interstate Commerce Commission) * * * shall take effect * * * according as shall be prescribed in the order.' The courts may not usurp the function of the Commission and say one of its orders shall become effective thirty days, a hundred days, or at any other time after entry. An order must take effect as prescribed; its effective date, if any, is the one actually appointed, not one which might have been."

Also see *Philadelphia-Detroit Lines, Inc.* v. *United States*, 31 F. Supp. 188. This last case upon appeal was affirmed per curiam by the Supreme Court, 308 U. S. 528.

As in that case, we hold that the Commission's action in this instant case was "a valid exercise by the Commission of its discretionary powers of which no abuse appears."

To sustain plaintiff's contention upon the second phase of the case before us would give precedent for untoward results that would completely dwarf the injury plaintiff complains of.

The logic of the situation refutes plaintiff's contention. It was plainly the Congressional intent to permit operation during the pendency only of a "grandfather" application. An applicant for a BMC 8 certificate is accorded no such privilege. If it is advisable that BMC 8 applicants ought also to have the privilege of operation while awaiting decision from the Commission the request for such should be made to Congress and not to the Court.

Plaintiff's action is dismissed.

LLOYD L. BLACK,
District Judge.

We concur.

BERT EMORY HANEY,
Circuit Judge.

JOHN C. BOWEN,
District Judge.

EXHIBIT "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

No. 314 Civil.

PETE LUBETICH, an Individual Doing Business as Pacific Refrigerated Motor Line, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant.*

DECREE—Filed July 8, 1941

In this suit brought under 28 U. S. C. A. 41 (28) to enjoin and set aside an order of the Interstate Commerce Commis-

sion, a court of three judges having been convened pursuant to the law in such case made and provided, the cause having been submitted for hearing upon final decree, and the Court having filed its opinion, findings of fact and conclusions of law, all of which are by reference made a part hereof; Now, therefore, for the reasons set forth in said opinion, findings and conclusions,

It is Ordered, Adjudged and Decreed that the plaintiff's suit be dismissed for want of equity.

July 8, 1941.

BERT EMORY HANEY,
United States Circuit Judge.
JOHN C. BOWEN,
United States District Judge.
LLOYD L. BLACK,
United States District Judge.